99-1147

No. ____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH KNICKERBOCKER,
Petitioner,

v.

OVAKO-AJAX, INC., AJAX ASSOCIATED COMPANIES, INC., RETIREMENT INCOME PLAN FOR NON-UNION EMPLOYEES, AND JONATHAN LUCAS, PLAN ADMINISTRATOR,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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15 pp

CORPORATE DISCLOSURE STATEMENT OF OVAKO-AJAX, INC.

Respondent Ovako-Ajax, Inc. is a corporation wholly owned by SKF ab. SKF ab is a corporation incorporated under the laws of the country of Sweden.

QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Sixth Circuit properly interpreted § 502(c)(1)(B) of ERISA by concluding that a district court may consider prejudice to a plan participant as a factor in exercising its discretion to impose a statutory penalty?

II. Whether in deciding this matter the United States Court of Appeals for the Sixth Circuit and the district court required that a plan participant has the burden of showing prejudice as a prerequisite to being awarded a statutory penalty under § 502(c)(1)(B) of ERISA?

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Rules of the Supreme Court of the United States
Rule 10 1

JURISDICTION

Rule 10 of the Rules of the Supreme Court of the United States provides that this Court may grant a petition for certiorari only for compelling reasons. Pursuant to Rule 10, compelling reasons may be found, among other things, if the decision leading to the petition: contributes to a conflict of authority between the circuit courts of appeal and/or state courts of last resort; reflects a departure from the usual course of judicial proceedings; or presents an important question of federal law that has not been but should be settled by this Court.

Petitioner has not set forth an adequate basis to justify the exercise of this Court's discretionary jurisdiction. There is no split of authority among the circuit courts of appeal on the issues presented. Moreover, Petitioner entirely misreads and misapplies the decision of the U.S. Court of Appeals for the Sixth Circuit in this matter. For the reasons explained fully below, there were no errors in the lower courts, and the Petition should be denied.

STATEMENT OF THE CASE

The Petitioner's statement of the case overlooks several facts pertinent to this matter and which are contained in the district court's opinion. Appendix to Petition pp. 23a-28a. Petitioner is a former employee of Respondent Ovako-Ajax, Inc. who started his employment as an hourly employee and later was promoted into salaried management. His employment ceased in 1991.

On October 12, 1994 Petitioner sent a letter to Respondent Jonathan Lucas, the plan administrator and Chairman of the Retirement Committee for the Ovako-Ajax, Inc. salaried employee pension plan, requesting a copy of the salaried plan and an estimate of any retirement benefits that he might be entitled to if he were awarded a disability retirement pension. Petitioner also asked for the salaried plan's Form 5500s filed with the Internal Revenue Service from 1989 to 1993. The Form 5500 constitutes the plan's tax return and includes actuarial information, plan liability and funding figures, a summary plan description, and other information relative to the plan.

By letter dated December 21, 1994, Petitioner was advised that he was not at that time eligible for a disability retirement under the terms of the salaried employee plan. In addition, Petitioner was provided a benefit statement showing his exact accrued retirement benefit under the salaried plan and his accrued retirement benefit under the pension plan applicable to hourly employees and how those figures were calculated. On January 9, 1995 Petitioner's attorney sent a letter stating that he represented the Petitioner and asking for a copy of the salaried plan. Thereafter, on March 20, 1995 Petitioner's attorney sent a letter seeking immediate payment of disability retirement pension benefits for Petitioner under

the salaried plan. After that request for disability benefits was denied, Petitioner's attorney filed an appeal with the plan's Retirement Committee seeking review of the denial. Within three months of his inquiry into the amount of his accrued monthly benefits, therefore, Petitioner was represented by counsel in a request for pension benefits.

On December 20, 1995, Petitioner filed a Complaint in the United States District Court for the Eastern District of Michigan alleging several state law claims, a claim for pension benefits under the Employee Retirement Income Security Act, and a claim that the court should impose a $100 per day penalty under § 502(c)(1)(B) of ERISA for Respondents' failure to provide him with copies of the Form 5500s for the salaried plan. On March 13, 1997, the Retirement Committee awarded Petitioner a disability retirement pension under both the salaried plan and hourly plan. Petitioner was provided with Form 5500s in July 1997. On March 4, 1998, the district court granted Respondents' Motion for Summary Judgment in its entirety. Appendix to Petition pp. 20a-48a.

The district court declined to impose a statutory penalty against Respondent Jonathan Lucas regarding the Form 5500s for several reasons: (1) the Petitioner had not shown that his rights were harmed or otherwise prejudiced by the delay in his receipt of the requested information; (2) he had not demonstrated bad faith or intentional delay on the Retirement Committee's part; and (3) within two months of Petitioner's initial inquiry about his benefits, the Retirement Committee sent Petitioner a personal benefits statement identifying the exact amount of benefits he was eventually awarded by the Retirement Committee and the manner in which his benefits were calculated. Appendix to Petition pp. 44a-45a.

After oral argument, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the district court on July 20, 1999.

ARGUMENT

I. The U.S. Court Of Appeals For The Sixth Circuit Did Not Require A Showing Of Prejudice Before The District Court May Consider Imposing A Statutory Penalty Under § 502(c)(1)(B) Of ERISA

At the bottom of page 5, Petitioner asserts that in its unpublished opinion the U.S. Court of Appeals for the Sixth Circuit "held that many courts, in their discretion, have not imposed any penalty under § 1132(c)(1)(B) [of ERISA] in the absence of prejudice." Petitioner then asserts that the Sixth Circuit found that "absent prejudice the penalty cannot be awarded." Petitioner entirely misstates the Sixth Circuit's opinion.

Section 502(c)(1)(B) of ERISA states that:

> Any administrator .... who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up

> to $100.00 a day from the date of such failure or refusal, and the Court may in its discretion order such other relief as it deems proper.
>
> 29 U. S. C. § 1132(c)(1)(B) (emphasis added)

In its opinion, the U.S. Court of Appeals for the Sixth Circuit expressly recognized that while § 502(c)(1)(B) of ERISA authorizes penalties, it does not require them. Appendix to Petition p. 10a It further recognized that the statute expressly commits the decision to impose penalties to the district court's discretion. *Id.* p. 11a Therefore, the Sixth Circuit reviewed the district court's decision whether to impose penalties for an abuse of discretion. *See also Bartling v Fruehauf Corp.*, 29 F3rd 1062, 1068 (6th Cir. 1994). An abuse of discretion exists when the reviewing court is firmly convinced that a mistake has been made. *Id.*

The Sixth Circuit then recognized that "although § 1132(c)(1)(B) does not require prejudice to impose penalties, a district court *may consider* prejudice in exercising its discretion." Appendix to Petition p. 11a (emphasis added). It went on to state "We note that many courts, in their discretion, have not imposed any penalty under § 1132(c)(1)(B) in the absence of prejudice." *Id.* Consequently, the Sixth Circuit ruled that the district court did not abuse its discretion by considering the issue of prejudice in deciding whether to impose penalties. *Id.* at pp. 11a-12a.

Petitioner's statement at page 5 is therefore incorrect. Nowhere in its opinion did the Sixth Circuit suggest that a showing of prejudice was required before the district court could impose a statutory penalty.

Moreover, nowhere in *Bartling* did the Sixth Circuit state that penalties cannot be imposed unless there is a showing of prejudice. Indeed, in affirming the district court's decision to award a penalty in *Bartling*, the Sixth Circuit stated only that: "Many courts have refused to impose a penalty under § 502(c)(1)(B) in the absence of a showing of prejudice or bad faith." 29 F. 3d at 1068.

Likewise, Petitioner is incorrect in asserting that the Sixth Circuit is in conflict with other circuit courts of appeal which have addressed this issue. Petition at p. 5. Each circuit court has, like the Sixth Circuit, expressly recognized that a district court may consider prejudice as a factor in deciding whether to award statutory penalties. *Rodriguez-Abreu v. Chase Manhattan Bank, N.A.*, 986 F. 2d 580, 588 (1st Cir. 1993)("Although prejudice and bad faith are not prerequisites for imposition of penalties, these are factors which the district court properly considered in exercising its discretion not to impose penalties."); *Davis v. Featherstone*, 97 F. 2d 734, 738 (4th Cir. 1996)(holding that district courts should assess two factors in deciding whether to impose a penalty: prejudice to plaintiff and nature of administrator's conduct); *Godwin v. Sun Life Assur. Co. of Canada*, 980 F. 2d 323, 327 (5th Cir. 1992)("Although section 1132 does not require the claimant to show he was prejudiced to be entitled to penalties, we suggested in *Paris* that prejudice is one factor a district court may consider in exercising its discretion."); *Bartling*, *supra*, 29 F. 3d at 1068; *Harsch v. Eisenberg*, 956 F. 2d 651, 662 (7th Cir. 1992)("the statute commits the size of a penalty to the district court's discretion; the judge may, but need not, consider the provable injury when exercising that discretion"); *Moothart v. Bell*, 21 F. 3d 1499, 1506 (10th Cir. 1994)(finding that while neither prejudice nor injury are a prerequisite to awarding penalties, "these are factors the district court may consider in deciding whether to exercise its

discretion"); *Curry v. Contract Fab. Inc. Profit Sharing Plan*, 891 F. 2d 842, 847 (11th Cir. 1990)("In exercising its discretion . . . the trial court may undoubtedly consider whether a denial of information prejudiced a plaintiff, but prejudice is not a prerequisite to an award of civil penalties.").[1]

None of these circuit courts of appeal, including the Sixth Circuit, has held, or even suggested, that prejudice is a prerequisite to imposing a penalty under § 502(c)(1)(B). Rather, each court has found that a district court is free to consider prejudice as a factor in deciding whether to assess a penalty. Upon a true reading of these opinions, it is therefore evident that Petitioner misstates the Sixth Circuit's decision in this matter, as well as the decisions of the First and Fifth Circuits in *Rodriguez-Abreu, supra* and *Godwin, supra*. See Petition at p. 7.

Moreover, as the Sixth Circuit properly ruled, the district court did not abuse its discretion in declining to impose a penalty. The district court declined to impose a penalty because it found that there was no harm or prejudice to Petitioner; there was no bad faith or intentional misbehavior on the part of Respondent; and that Respondent timely transmitted a personal benefit statement showing Petitioner the exact amount of his vested pension benefit.

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[1] Petitioner's cite of *Daughtry v. Honeywell, Inc.*, 3 F. 3d 1488 (11th Cir. 1993) is unavailing inasmuch as the U.S. Court of Appeals for the Eleventh Circuit held only that the district court erred by basing its decision to deny penalties *solely* on the plaintiff's failure to show prejudice. In *Daughtry*, the defendant did not provide the plaintiff with a benefits statement until one year after the plaintiff asked for it. In contrast, in this case the Respondents provided Petitioner with a complete benefits statement two months after his written request for one.

Appendix to Petition pp. 44a-45a. The Sixth Circuit affirmed that the district court acted within its discretion. *Id.* pp. 11a-12a. This Court should therefore deny the petition for a writ of certiorari.

II. The U.S. Court Of Appeals For The Sixth Circuit Did Not Rule That Petitioner Has The Burden Of Showing Prejudice As A Prerequisite To Being Awarded A Statutory Penalty

Petitioner again incorrectly states that in its opinion the Sixth Circuit implied that a plan participant has the burden of persuasion as to whether or not prejudice is a requisite to the district court's award of a statutory penalty. Petition at 11. The Sixth Circuit expressly stated that it was not opining on the unbriefed issue of whether the plan participant or the plan administrator had the burden of persuasion on the claim for penalties. Appendix to Petition pp. 11a. Indeed, nowhere in its opinion does the Sixth Circuit find, expressly or by implication, that the plan participant has the burden of showing prejudice, or other compelling reasons, before penalties may be imposed. Nor did the district court make such a finding. *Id.* pp. 42a-45a.

Petitioner fails to engage in a true reading of the Sixth Circuit's opinion. The Sixth Circuit found only that the district court's conclusion that Petitioner was not prejudiced was not an abuse of discretion and that it was not improper for the district court to rely on this factor in declining to impose a penalty. *Id.* pp. 11a-12a.

There is no demonstration of error on the part of the U.S. Court of Appeals for the Sixth Circuit nor on the district

court in declining to impose statutory penalties. This Court should therefore deny the petition for writ of certiorari.

CONCLUSION

In presenting his arguments in favor of a writ of certiorari, Petitioner misstates the decision of the U.S. Court of Appeals for the Sixth Circuit in this matter. The Sixth Circuit did not decide that a plan participant must demonstrate prejudice before being entitled to statutory penalties under ERISA. There is no conflict in the circuit courts of appeal on this issue in that all recognize that prejudice is but one factor that a district court may review in exercising its discretion to impose penalties. Nor did the Sixth Circuit decide that a plan participant has the burden of persuasion on the issue of prejudice. Finally, the district court's opinion shows that it considered several factors in addition to prejudice in declining to impose a penalty. Therefore, it is unnecessary for this Court to assert its discretionary jurisdiction in this matter, and this Court should deny the petition for a writ of certiorari.

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Dated: December 30, 1999